INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	5
Summary of argument	8
Argument: Section 11 of the Clayton Act, providing for judicial review of orders of the Federal Trade Commission directed against violation of the Act, did not authorize the court below to modify the order issued against respondent, adjudicated to be valid, so as to postpone the order's effective date until the court, upon the basis of the Commission's future proceedings against respondent's competitors, chooses to let the order go into effect	10
Conclusion	22

CITATIONS

Cases:	
American Chain & Cable Co. v. *Federal Trade Commission*, 142 F. 2d 909	11
Edelmann & Co. v. *Federal Trade Commission*, 239 F. 2d 152 (pending on petition for certiorari, No. 101, this Term)	7, 19
El Moro Cigar Co. v. *Federal Trade Commission*, 107 F. 2d 429	15–16
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134	12
Federal Trade Commission v. *Cement Institute*, 333 U. S. 683	16
Federal Trade Commission v. *Eastman Kodak Co.*, 274 U. S. 619	11
Federal Trade Commission v. *Keppel & Bros.*, 291 U. S. 304	14
Federal Trade Commission v. *National Lead Co.*, 352 U. S. 419	16

438849—57——1

Cases—Continued

	Page
Federal Trade Commission v. *Ruberoid Co.*, 343 U. S. 470	17
Federal Trade Commission v. *Winstead Hosiery Co.*, 258 U. S. 483	14
Indiana Quartered Oak Co. v. *Federal Trade Commission*, 58 F. 2d 182	11
Moog Industries v. *Federal Trade Commission*, No. 77, this Term	19
National Candy Co. v. *Federal Trade Commission*, 104 F. 2d 999	15
Natural Gas Pipeline Co. v. *Federal Power Commission*, 128 F. 2d 481	11
P. & D. Manufacturing Co. v. *Federal Trade Commission*, 245 F. 2d 281	19
Scripps-Howard Radio v. *Federal Communications Commission*, 316 U. S. 4	12
Siegel, Jacob Co. v. *Federal Trade Commission*, 327 U. S. 608	16
Sorensen Manufacturing Co. v. *Federal Trade Commission* (C. A. D. C.), decided May 23, 1957 (not yet reported)	19
Standard Oil Co. v. *United States*, 337 U. S. 293	15
United States v. *Wabash Railroad Co.*, 321 U. S. 403	9, 13
Whitaker Cable Corp. v. *Federal Trade Commission*, 239 F. 2d 253, certiorari denied, 353 U. S. 938	7, 19

Statute:

Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526:	
Section 2 (a) (15 U. S. C. 13 (a))	2
Section 2 (b) (15 U. S. C. 13 (b))	3
Section 4 (15 U. S. C. 15)	14
Section 11 (15 U. S. C. 21)	3, 10
Section 16 (15 U. S. C. 26)	14

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 110

FEDERAL TRADE COMMISSION, PETITIONER

v.

C. E. NIEHOFF & Co.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the Court of Appeals and the dissenting opinion of Judge Finnegan (R. 1035–43) are reported in 241 F. 2d 37. The opinion of the Federal Trade Commission (R. 1013–28) is reported in 51 F. T. C. 1114.

JURISDICTION

The Court of Appeals on January 9, 1957, entered a judgment which modified the Commission's order and affirmed the order as thus modified (R. 1044). The court entertained the Commission's petition for rehearing *en banc,* but denied the petition on February 21, 1957, Chief Judge Duffy and Judge Finnegan dissenting (R. 1045). Following such denial, the

court entered its final judgment on March 28, 1957 (R. 1046–7). The petition for a writ of certiorari was filed on April 23, 1957, and was granted on June 3, 1957 (R. 1047). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The Court of Appeals upheld the Federal Trade Commission's determination that respondent has discriminated in price between different purchasers of its products in violation of Section 2 (a) of the Clayton Act, and it affirmed the prohibitions of the Commission's cease-and-desist order. The court, however, modified the order by substituting for the provision that it take effect "forthwith" a provision that the order "shall take effect at such time in the future" as the court "may direct, *sua sponte* or upon motion of the Federal Trade Commission."

The question presented is whether Section 11 of the Clayton Act, in conferring upon the several courts of appeals jurisdiction to affirm, set aside, or "modify" orders of the Federal Trade Commission directed against violations of the Act, authorized the court below to postpone the effective date of such an order, adjudicated to be valid, pending issuance of like cease and desist orders against respondent's competitors.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

> (a) That it shall be unlawful for any person engaged in commerce, in the course of such

commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *. * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price * * *, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, * * *: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, * * *.

Section 11 of the Clayton Act, 38 Stat. 734, as amended, 15 U. S. C. 21, provides in part:

That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air car-

riers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

Whenever the Commission * * * shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearhearing * * *. * * * If upon such hearing the Commission * * * shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order. * * *

If such person fails or neglects to obey such order * * * the Commission or Board may apply to the United States court of appeals * * * for the enforcement of its order * * *. Upon such filing of the application and transcript the court * * * shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming,

modifying, or setting aside the order of the Commission or Board. The findings of the Commission or Board as to the facts, if supported by substantial evidence, shall be conclusive. * * *

Any party required by such order of the Commission or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the Commission or Board be set aside. * * * Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission or Board as in the case of an application by the Commission or Board for the enforcement of its order, * * *.

The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.

* * * * * *

STATEMENT

The Commission in May 1950 filed a complaint charging that respondent, a producer and seller of automotive products, had been discriminating in price between different purchasers of products of like grade and quality, in violation of Section 2 (a) of the Clayton Act (R. 2–3). Following the taking of evidence, the Commission's hearing examiner filed an "Initial Decision" which set forth his findings of fact, conclusion, and proposed order (R. 980–1011). On cross appeals to the Commission, it filed a written opinion which affirmed the examiner's conclusion that respondent had violated Section 2 (a) and affirmed, with minor modifications, his findings of fact and pro-

posed order (R. 1013–28). The order which the Commission thereupon entered directed that respondent "forthwith" cease and desist, in the sale of automotive parts of like grade and quality, from selling to any purchaser at net prices higher than the net prices charged any other purchaser, when such purchasers in fact compete in the resale of said products (R. 1012).

The basic facts are not in dispute (R. 1036). Respondent sells on a nationwide basis to jobbers, who in turn resell to garages, to fleet owners, to gasoline stations, and over-the-counter (R. 1014). It sells to the jobbers at list price, less discounts granted on the basis of the particular jobber's purchases from respondent during the preceding year, and these discounts ranged from zero on purchases under $1,200 and 5% on purchases from $1,200 to $2,400, to 17% on purchases of $12,000 and over (R. 998, 1014–5). The products sold are resold for use as replacement parts since respondent does not sell any original equipment to automobile manufacturers (R. 1014). Respondent's total sales in 1949 were more than $2,000,000, 90% of which were in the ignition line and the balance in the hydraulic line and testing equipment line (R. 982).

The Commission found that the business of jobbers of automotive parts is "highly competitive" (R. 1017); that such jobbers generally operate on a "very thin margin of profit—four percent of sales or less" (R. 986); that all jobbers must take the 2% cash discount which respondent allows for cash payment since failure to do so would in many instances wipe out or

materially reduce the jobber's profit (R. 1015–6); and that a smaller discount or price differential than that granted by respondent "directly and markedly affects profit margins" (R. 990, 1015). The Commission further found that jobbers located in the same trading area are in competition with each other (R. 985, 1015); that respondent's price differentials "are substantial and materially influence the competitive positions of purchasers who resell respondent's merchandise" (R. 1017); and that respondent's "discounts and rebates to its favored customers carried a direct potentiality of injuring, destroying and preventing competition among its purchasers" (R. 1016).

On respondent's petition for review, the court below held that there was substantial evidence to support the findings made by the Commission in rejecting (1) respondent's defense that its price differentials were cost justified and (2) its defense that its lower prices had been made in good faith to meet the equally low prices of competitors (R. 1040). The court also held that its prior decisions in *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253, certiorari denied, 353 U. S. 938, and *Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152, pending on petition for certiorari, No. 101, this Term, were controlling with respect to respondent's attack upon the Commission's finding that respondent's price discriminations would probably injure competition among respondent's jobber customers (R. 1039).

The court, after upholding the Commission's order, modified it by postponing its effective date until such

time as the court might subsequently direct (R. 1042). The court gave the following reasons for this action: in the sale of its ignition line, respondent has 19 competitors; their trade practices are "essentially similar" to those condemned in the order against respondent; the Commission has instituted proceedings against only three of these competitors; and there was uncontradicted evidence to support respondent's "prediction" that it would be forced out of business if it is barred from following its traditional pricing practices while its competitors are not (R. 1040–1). The court concluded that Section 11 of the Clayton Act vested in it the powers of a "trial court of equity of general jurisdiction" and thus empowered it to grant relief on "equitable principles" (R. 1041–2). Accordingly, the court ruled (R. 1042): "The fixing of the time at which the order against Niehoff shall become effective is a matter over which we now reserve jurisdiction, the exercise of which will depend upon the future course of the commission's proceedings against Niehoff's competitors."

SUMMARY OF ARGUMENT

A

The court below decreed that the order of the Federal Trade Commission should not take effect until such time in the future as the court might later direct. The court was not thereby laying bare and correcting an error of law by the Commission, for the court found no such error. The court, although not purporting to correct any error of law, modified the Commission's order so as to render it a nullity

for an indefinite future time. The court sanctioned, on the basis of "equitable principles," continuance of an adjudicated statutory violation. Section 11 of the Clayton Act confers no such authority.

B

A regulatory statute which vests in an administrative agency the power and duty of enforcement does not make simultaneous proceedings against all suspected or probable like violations an implied condition of such enforcement. Stated otherwise, an administrative order directed against violation is not rendered invalid or unenforceable by reason of the fact that no administrative proceedings have been instituted against similarly situated competitors. This Court has so held. *United States* v. *Wabash Railroad Company,* 321 U. S. 403. A contrary ruling would have the effect of stultifying an agency's execution of its statutory responsibilities.

C

Not only was there no ruling by the court below that the Commission's "forthwith" command constituted an abuse of discretion, but on the facts such a ruling would be quite plainly without justification. These facts show that in the replacement ignition parts industry there is neither price uniformity nor uniformity in annual volume discounts. Moreover, in a relatively short time after the filing of the complaint against respondent, the Commission filed Section 2 (a) complaints against other members of the automotive replacement parts industry. Courts of appeals have affirmed the cease-and-desist orders issued in six of these proceedings, and each of the

affirmed orders, except that against respondent, requires "forthwith" compliance. Two of these orders were against companies engaged in selling ignition-line parts and named by respondent as competitors. Thus the judgment below, entered for the avowed purpose of preventing competitive inequality, actually creates this inequality as between respondent and these competitors.

D

Furthermore, the judgment below constitutes judicial intrusion upon purely administrative duties and functions. It is for the Commission—not the courts—to determine the best possible use of staff and funds in enforcing statutes which Congress has charged the Commission with administering.

ARGUMENT

SECTION 11 OF THE CLAYTON ACT, PROVIDING FOR JUDICIAL REVIEW OF ORDERS OF THE FEDERAL TRADE COMMISSION DIRECTED AGAINST VIOLATION OF THE ACT, DID NOT AUTHORIZE THE COURT BELOW TO MODIFY THE ORDER ISSUED AGAINST RESPONDENT, ADJUDICATED TO BE VALID, SO AS TO POSTPONE THE ORDER'S EFFECTIVE DATE UNTIL THE COURT, UPON THE BASIS OF THE COMMISSION'S FUTURE PROCEEDINGS AGAINST RESPONDENT'S COMPETITORS, CHOOSES TO LET THE ORDER GO INTO EFFECT

A

The court below was of the view that its jurisdiction to review orders of the Federal Trade Commission, as conferred by Section 11 of the Clayton Act, is original rather than appellate, and that it was empowered to protect the "rights" of the parties in the same man-

ner as "any trial court of equity of general jurisdiction" (R. 1041–2). We believe that the validity of the court's action in postponing the effective date of the Commission's order turns upon considerations other than whether the jurisdiction of the court is properly labeled original or appellate. There is judicial support for each characterization.[1] But the point here is that the distinction between them, which may be determinative of powers and duties in proceedings involving solely judicial action, is not determinative of a court's powers in reviewing administrative action pursuant to express statutory authorization.

The concepts developed with respect to the "relationship of federal courts *inter se*" have only meager application where the powers which a court may exercise in reviewing administrative action necessarily depend upon the "distribution of authority made by Congress" as between court and administrative body.

---

[1] For decisions stating that statutes empowering courts of appeals to review administrative orders constitute a grant of original jurisdiction, see *Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 58 F. 2d 182, 184 (C. A. 2); *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 128 F. 2d 481, 484 (C. A. 7).

For decisions stating that such reviewing function is an exercise of appellate jurisdiction, see *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U. S. 619, 623–624; *American Chain & Cable Co.* v. *Federal Trade Commission*, 142 F. 2d 909, note 1 at 911 (C. A. 4). In the *Eastman Kodak* case, the Court said that the power to review Commission orders given to courts of appeal "is limited to the question whether or not it [the Commission] has properly exercised the administrative authority given it by the Act", and that such review is "appellate and revisory merely, and not an exercise of original jurisdiction by the court itself".

Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141. The Court said further (*ibid.*):

> The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of "judicial power" conferred by Congress under the Constitution.

In answer to the contention made in *Pottsville* that administrative delay and hardship might result if the Court of Appeals had no power to take the action which was being contested, the Court said (*id.*, 146): "But courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. * * * Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies."

In *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U. S. 4, this Court further delineated the scope of judicial review of administrative action. It said (p. 10):

> Generally speaking, judicial review of administrative orders is limited to determining whether errors of law have been committed. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 139–40. Because of historical differences in the relationship between administrative bodies and reviewing courts and that between lower and upper courts, a court of re-

view exhausts it power when it lays bare a misconception of law and compels correction. * * *

In the instant case, the court below decreed that the order of the Commission should not take effect until such time in the future as the court might later direct. The court, in so acting, was not laying bare and correcting an error of law by the Commission, for the court found no such error. The court, although not purporting to correct any error of law, modified the Commission's order so as to render it a nullity for an indefinite future time.[2] The court sanctioned, on the basis of "equitable principles", continuance of an adjudicated statutory violation.

B

But a regulatory statute which vests in an administrative agency the power and the duty of enforcement does not make simultaneous proceedings against all suspected or probable like violations an implied condition of such enforcement. Stated otherwise, an administrative order directed against a statutory violation is not rendered invalid or unenforcible by reason of the fact that no administrative proceedings have been instituted against similarly situated competitors of the party bound by the order. This Court has so held.

In *United States* v. *Wabash Railroad Co.*, 321 U. S. 403, the Interstate Commerce Commission had issued an order prohibiting carriers serving a particular manufacturing plant from granting it a spotting allow-

[2] The court did not specify the circumstances which would suffice to lift the court-imposed ban.

ance in violation of Section 6 (7) of the Interstate Commerce Act, which prohibits carriers from granting a shipper any privilege not specified in the carrier's tariffs. The Commission had not instituted proceedings against similar spotting service rendered at competing plants, and, on review of the order by a three-judge district court, the order was set aside upon the ground that it would compel the carriers to discriminate unlawfully against the shipper in question. This Court nevertheless held the order valid and enforcible.[3] It said (p. 414):

> The suppression of abuses resulting from violations of § 6 (7) would be rendered practically impossible if the Commission were required to suppress all simultaneously or none. Section 12 (1) imposes on the Commission the duty to enforce the provisions of the Act. That duty under § 6 (7) would hardly be performed if the Commission were to decline to enforce it against one because it could not at the same time enforce it against all.

Cf. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, 492, 494; *Federal Trade Commis-*

[3] In its brief opposing certiorari (p. 7), respondent urged as a distinction between the *Wabash* case and the present one that Section 13 (1) of the Interstate Commerce Act authorizes a shipper to initiate an administrative proceeding against alleged violations of the Act, whereas the Clayton Act has no such statutory provision. But Section 16 of the Clayton Act, 15 U. S. C. 26, authorizes private parties to bring suits in federal district courts for injunctive relief against violation of the antitrust laws, and Section 4 of the Act, 15 U. S. C. 15, authorizes any person injured by a violation of the antitrust laws to bring suit for recovery of triple the damages sustained. These remedies are plainly more potent than the administrative-complaint remedy authorized by the Interstate Commerce Act.

sion v. *Keppel & Bro.*, 291 U. S. 304, 308–309, 312–313.*

If such orders, effective on issuance, may not be resisted upon the ground that competitors are not equally bound, we submit that this ground also affords no basis for postponing the effective date of a Commission order, and that a reviewing court exceeds the limit of its authority in granting interim nullification of the order. Certainly the underlying considerations are the same. As the Federal Trade Commission stated in the instant case, the grant of respondent's request that the proceeding be held in abeyance until the Commission could place all industry members under identical restrictions "would mean that Commission orders would be forever pending and unlawful practices rarely, if ever, corrected" (R. 1026). The respondent's pricing system, it must again be emphasized, has already been adjudicated to be unlawful and injurious to the public interest.

Applicable decisions are in accord. In *National Candy Co.* v. *Federal Trade Commission*, 104 F. 2d 999, 1004 (C. A. 7), the court, in affirming a Commission order directed against unfair methods of competition, rejected the contention that, because competitors use the same unfair method of competition, it would be prejudicially discriminatory "to permit the order to become operative." In *El Moro Cigar Co.* v.

* See also, *e. g.*, *Standard Oil Co.* v. *United States*, 337 U. S. 293, 295, 309, 314, which upheld a judgment enjoining a company from enforcing or entering into exclusive supply contracts, contrary to Section 3 of the Clayton Act, although no like judgment has been entered against major competitors who were employing similar exclusive contracts.

Federal Trade Commission, 107 F. 2d 429 (C. A. 4), the Commission's order required change in a brand name found to be deceptive, and the cigar company urged that the reviewing court, if it enforced the order, postpone its effective date for a reasonable time. The court, however, declared: "This matter is more properly within the province of the Commission rather than the courts. We are of the opinion that we have no power to order any delay in the putting into effect of a lawful order of the Commission." 107 F. 2d at 432.

C

It is well settled that the Federal Trade Commission, like other administrative agencies under comparable statutes, has "wide discretion" in selecting the remedy necessary and appropriate to terminate practices found to be unlawful; that judicial review is limited to ascertaining whether the Commission has "made an allowable judgment in its choice of the remedy"; and that a reviewing court may interfere only if the Commission has "abused its discretion". *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 611–612. In determining the remedy, the Commission is entitled not only to "appraise the facts of the particular case" but also to "draw from its generalized experience." *Id.*, 614. Congress has "placed the primary responsibility for fashioning orders upon the Commission" (*Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419, 429), and reviewing courts should not "lightly modify" its orders (*Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 726). These governing principles are not confined to

orders issued under Section 5 of the Trade Commission Act; they equally apply to Commission orders directed against violation of Section 2 (a) of the Clayton Act. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 473.

The Commission's determination of the requisite remedy necessarily involves, as one element, determination of when the remedy shall take effect. But the court below did not consider whether the Commission had exceeded the limits of an allowable judgment in directing respondent to cease forthwith from violating the statute. Instead, the court applied the test of the considerations which guide a court of equity, in the exercise of original jurisdiction, in fashioning injunctive relief.

Not only did the court not rule that the Commission's "forthwith" command constituted an abuse of discretion, but on the facts such a ruling would be quite plainly without justification. These facts show that in the replacement ignition parts industry there is neither price uniformity nor uniformity in annual volume discounts. The Commission set forth in its findings a comparison of respondent's jobber prices (without discount) and the jobber prices (without discount) of ten of its major competitors on 57 of respondent's most popular items constituting 80% of its ignition line volume. The tabulation shows that, as to each competitor, respondent's prices were higher on some items, lower on others, and the same on still others, and it shows 522 comparative prices,[5] with re-

[5] The comparative prices shown do not total 570 because not every competitor made all 57 items.

spondent's prices higher in 226 instances, lower in 152, and the same in 144 (R. 997–8). The findings also set forth the discounts based on annual volume granted by the same ten competitors. Two granted no volume discount, and the other eight had the following maximum discounts: one, 15%; five 20%; one, 23%; one, 25% (R. 998–9). None coincided with respondent's 17% maximum, and seven had a higher maximum.

The Commission's order prohibits the price discriminations found to result from respondent's annual volume discounts, but it leaves respondent complete freedom in determining both the prices it will charge and the discounts which it will grant (provided there is no variation in discount based on annual volume of purchases). Respondent has many alternatives and is not limited to a choice between (1) selling, without discount, at present basic jobber prices and (2) extending to all jobbers its present maximum 17% discount. The fact that, among ten of its leading competitors,* two have granted no volume discounts is difficult to reconcile with respondent's "prediction" of the dire consequences of the Commission's order. Certainly it was well within the area of an allowable administrative judgment for the Commission to conclude that respondent's calamitous predictions were speculative and not likely of realization, and that there were offsetting, overbalancing considerations—namely, the serious difficulties, uncertainties, and delays necessarily resulting if enforcement of the Commission's order were made contingent upon the institution and prose-

* Respondent selected these ten for the purpose of submitting certain comparative data.

cution of proceedings against all discoverable competitors who were or might be violating Section 2 (a).

Respondent is not in a position to complain that the Commission made it a legal guinea pig. Within a relatively short time before or after the filing of the complaint against respondent, the Commission filed 14 Section 2 (a) complaints against members of the automotive replacement parts industry. Courts of appeals have affirmed the cease and desist orders issued in six of these proceedings, and each of the orders affirmed, except that against respondent, requires forthwith compliance.[7] Two of the orders were against companies engaged in selling ignition line parts and named by respondent as competitors (R. 268–270).[8]

Nor is there any basis for contending that, in issuing complaints against those who primarily sell the ignition line, the Commission was improperly selective. The record does not show which of the companies named as competitors did a business comparable in size to respondent's and which offered only localized or relatively insignificant competition.[9] It is fair to presume that the four ignition line com-

[7] See *Moog Industries* v. *Federal Trade Commission*, No. 77, this Term; *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253 (C. A. 7), certiorari denied, 353 U. S. 938; *Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152 (C. A. 7), certiorari pending, No. 101, this Term; *P. & D. Manufacturing Co.* v. *Federal Trade Commission*, 245 F. 2d 281 (C. A. 7); *Sorensen Manufacturing Co.* v. *Federal Trade Commission* (C. A. D. C.), decided May 23, 1957, not yet reported.

[8] See *P. & D.* and *Sorensen* cases, *supra* note 7.

[9] Respondent classified as a "competitor" any company which sold ignition parts, irrespective of whether the company had actually competed with respondent (R. 996).

panies against which the Commission filed complaints are the leaders of this segment of the industry.[10]

In view of judicial affirmance of orders against two of respondent's chief competitors, the judgment below, entered for the avowed purpose of preventing competitive inequality, actually creates this inequality as between respondent and these competitors. This illustrates the dangers necessarily involved when a reviewing court reserves to itself power to determine the effective date of a valid Commission order for the purpose of compelling simultaneous administrative action against the members of an industry.

D

The judgment entered below constitutes judicial intrusion upon purely administrative duties and functions.

The court assumed control over the time at which the Commission's order should become effective, exercise of which control was to depend upon "the future course of the commission's proceedings" against respondent's competitors (R. 1042). Under this judgment, three alternatives are open to the Commission. One is to allow the order against respondent to remain a nullity, which would mean that a valid order is, in effect, defeated. The second is to investigate and bring proceedings against each of respondent's various alleged competitors, without regard to whether this allocation of limited manpower and

[10] The yearly sales of the P. & D. Manufacturing Company and the Sorensen Company (see note 7, *supra*) were, respectively, $1,685,000 and $1,300,000.

money is warranted by the economic effect or importance of the possible violations involved. Adoption of this course would mean that the Commission might be compelled to take action without regard to its duty to make the best possible use of staff and funds in enforcing the statutes which it administers. Thirdly, the Commission might seek to establish to the court's satisfaction that, insofar as respondent's competitors have not been proceeded against, there were good and sufficient reasons therefor. Adoption of this course would mean that the court would sit in judgment upon the Commission's exercise of its investigatory and enforcement functions.

Thus, regardless of which of the three alternatives were adopted, the result of affirmance of the judgment below would be substantial interference with the Commission's exercise of its statutory responsibilities. The opinion of Judge Finnegan in the court below, dissenting from the court's modification of the Commission's order, put the matter as follows (R. 1043):

> My grave doubts that our statutory power to *modify* Federal Trade Commission orders can be converted into policing and supervising, though perhaps obliquely, the length, breadth and sequence of Commission investigations brings me to the position I now take. Certainly we would refuse to activate the Commission upon a bare petition for mandamus to investigate the automotive ignition industry. Responsibility of achieving enforcement of the statutes Congress assigned to the Commission lies elsewhere.

In addition, the decision below is an open invitation to inject into the administrative proceedings under Section 2 (a) collateral issues as to who are substantial competitors of the respondent, the extent to which the pricing practices of these competitors parallel those of the respondent, and the status of proceedings against the competitors. This would prolong and complicate proceedings which are already time-consuming and costly. The decision below would also be a precedent for injecting like collateral issues in other Clayton Act and Trade Commission Act proceedings.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed, with directions to affirm the order of the Commission without modification.

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
CHARLES H. WESTON,
Attorney.

EARL W. KINTER,
General Counsel,
JAMES E. CORKEY,
Assistant General Counsel,
Federal Trade Commission.

SEPTEMBER 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957